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In the Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA, PETITIONER

v.

CAJO TRADING, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

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The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Customs and Patent Appeals entered in this case on May 15, 1968.

OPINIONS BELOW

The opinion of the Customs Court, First Division (App. A) is reported at 56 Cust. Ct. 143, C.D. 2621. The opinion of the Court of Customs and Patent Appeals (App. B) is reported at 2 Cust. Bull. No. 10, p. 78 (March 6, 1968).

JURISDICTION

The judgment of the Court of Customs and Patent Appeals was entered on February 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTION PRESENTED

Whether the 60-day limitations period provided by Section 514 of the Tariff Act of 1930 for protesting a tariff determination ("liquidation") by the Collector of Customs is applicable to a protest asserting that the liquidation was not in accordance with law because it applied a rate of duty established by a Presidential Proclamation subsequently held invalid.

STATUTES INVOLVED

Section 505 of the Tariff Act of 1930, 46 Stat. 732, 19 U.S.C. 1505, provides:

> The consignee shall deposit with the collector, at the time of making entry, unless the merchandise is entered for warehouse or transportation, or under bond, the amount of duty estimated to be payable thereon. Upon receipt of the appraiser's report and of the various reports of landing, weight, gauge, or measurement the collector shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise as provided by law and shall give notice of such liquidation in the form and manner prescribed by the Secretary of the Treasury, and collect any increased or additional duties due or refund any excess of duties deposited as determined on such liquidation.

Section 514 of the Tariff Act of 1930, 46 Stat. 734, 19 U.S.C. 1514, provides:

> Except as provided in subdivision (b) of section 516 of this Act (relating to protests by American manufacturers, producers, and wholesalers), all decisions of the collector, including the legality of all orders and findings en-

tering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury) * * * under any provision of the customs laws, and his liquidation or reliquidation of any entry, * * * shall, upon the expiration of sixty days after the date of such liquidation, * * * be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction * * * shall, within sixty days after, but not before such liquidation * * * file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, or refusal, the reasons for the objection thereto. * * *

Section 515 of the Tariff Act of 1930, 46 Stat. 734, 19 U.S.C. 1515, provides:

> Upon the filing of such protest the collector shall within ninety days thereafter review his decision, and may modify the same in whole or in part and thereafter remit or refund any duties * * *. If the collector shall, upon such review, affirm his original decision, * * * then the collector shall forthwith transmit the entry and the accompanying papers, and all the exhibits connected therewith, to the United States Cutoms Court for due assignment and determination, as provided by law. * * *

STATEMENT

Under Section 505 of the Tariff Act of 1930 (19 U.S.C. 1505), the consignee of imported merchandise

is required to deposit with the Collector of Customs, at the time of entry, the amount of duties which the Collector estimates is payable. Later, after receiving appraiser's and other reports, the Collector determines precisely the rate and amount of the duties owed. This process is referred to as "liquidation" of the rate and amount of duties. The Collector then gives the consignee notice of the liquidation and collects any additional duties due or refunds any excess which has been deposited.

Section 514 of the Act (19 U.S.C. 1514) provides that this liquidation by the Collector "shall, upon the expiration of sixty days after the date of such liquidation, * * * be final and conclusive upon all persons * * *, unless the importer, consignee, or agent of the person paying such charge or exaction * * * shall, within sixty days after, but not before such liquidation * * * file a protest in writing with the collector * * *." Section 515 (19 U.S.C. 1515) goes on to provide that, upon the filing of a protest, the Collector shall review his prior decision; if he affirms it, he is to transmit the entry and all exhibits to the Customs Court for a determination of the dispute by that court.

The merchandise involved here, consisting of spring clothespins, was liquidated by the Collector of Customs at New York on December 27, 1957, and the duties were assessed at the rate of 20 cents per gross as directed by Presidential Proclamation No. 3211 (T.D. 54493). No protest was filed by the consignee against this liquidation within the 60-day limitations period prescribed by Section 514.

Thereafter, on October 18, 1961, the Customs Court, First Division, rendered its decision in the case of *Falcon Sales Co.* v. *United States,* 47 Cust. Ct. 129, C.D. 2292, holding that Presidential Proclamation No. 3211 was invalid because the President's action was beyond the authority granted to him by Congress. By this Proclamation the President had suspended the rate modification negotiated under the General Agreement on Tariffs and Trade applicable to spring clothespins, *i.e.,* from the full statutory rate of 20 cents per gross to 10 cents per gross. The government did not pursue an appeal of the *Falcon Sales* decision to the Court of Customs and Patent Appeals, in the belief that the case lost prospective importance when, some months after the decision, the President rescinded, in relevant part, Proclamation No. 3211. See Presidential Proclamation No. 3468, 27 Fed. Reg. 4235, 4236 (May 3, 1962).

Thereafter, on January 25, 1963, the consignee served a written demand on the Collector of Customs to liquidate the entry previously considered to have been liquidated on December 27, 1957, on the ground that the previous liquidation was void because based on an invalid Presidential Proclamation (R. 10–11). Upon the Collector's refusal to liquidate (R. 9, 12–13),[1] the consignee filed the protest which has given rise to the present litigation.

In the Customs Court proceeding, the consignee's position was upheld. That court concluded that there had been no valid liquidation because that which had

[1] In refusing the request to liquidate, the Collector noted that many similar requests had been received (R. 12).

occurred was under the authority of an invalid Presidential Proclamation. Accordingly, the protest was dismissed as premature (protests may be filed only after a liquidation has taken place), the Court holding that the Collector was under an obligation to liquidate the subject entry anew (App. 33–37).

In reaching its decision, the Customs Court relied on *United States* v. *C. O. Mason, Inc.*, 51 CCPA 107, C.A.D. 884, certiorari denied, 379 U.S. 999. There, the Court of Customs and Patent Appeals refused to apply the 60-day limitations period to a liquidation under a statute later held to be unconstitutional. Since Section 505 (19 U.S.C. 1505) of the Tariff Act requires the Collector of Customs to liquidate entries "as provided by law," it was reasoned in *Mason* that "a liquidation made pursuant to a provision of a statute subsequently declared to be unconstitutional is [not] a liquidation 'as provided by law'" (51 CCPA at 113).

Analogizing to *Mason*, the Customs Court in the instant case, although it expressed serious concern about the potential scope of the so-called "void liquidation doctrine" (App. 35–36), concluded that "[i]f a liquidation based on an unconstitutional statute is void, one founded on an unauthorized Presidential proclamation appears equally so" (App. 35).

An appeal by the government to the Court of Customs and Patent Appeals ensued. That court, dividing three to two, affirmed the decision of the Customs Court, stating (App. 23–24):

> What we do say here is that we have the same difficulty as did the Customs Court in finding

> a valid distinction between an unconstitutional statute on the one hand, and an invalid Presidential proclamation on the other—the effect is the same in both cases. * * * [W]e do not think it can fairly be said that Congress intended Section 514 to control in either instance.

Differing with the majority,[2] Judges Rich and Smith (who had agreed with the decision in *Mason*) supported the government's position that the protest here was barred under Section 514, stating (App. 28–29):

> The phrase in which an idea is here about to be encysted is "liquidation 'as provided by law'," taken from our *Mason* opinion. We used that phrase in rationalizing the decision in a case involving an *unconstitutional statute*. We were discussing nothing else. We are now being asked to apply it to a different situation, not involving an unconstitutional statute. And the next thing we know—if we affirm here—we will be asked to apply it to cases in which collectors have classified goods in the wrong statutory class and appraisers have valued them according to the wrong section of the statute, or have assessed them at the wrong value. * * * For it is indisputable that all such erroneous liquidations by collectors and valuations by appraisers

[2] The opinion of Judges Rich and Smith was nominally a concurring, rather than a dissenting, opinion only because their position led them to the same result as the majority opinion—dismissal of the protest. That was so, however, simply because of the procedural posture of the case. Their ground of decision differed radically from that of the majority, and would have had a substantially different effect. For them, the protest was too late and forever barred; for the majority, it was premature since no valid liquidation had taken place (see note 4, *infra*).

> are not "as provided by law." * * * [W]e do have the express mandate of Congress in section 514 that protests to actions of collectors which are displeasing to importers shall be filed within 60 days or they shall "be final and conclusive on all persons." That is what Congress intended. It is we who created an exception.

The "concurrence" then went on to state (App. 29–30):

> We have gone so far as to make a judicial (not Congressional) exception in the case of unconstitutional statutes. Now that it has been shown to us * * * where so-called "logical" extensions of that exception clearly lead, it behooves us to stop where we are and make no further exceptions, for we are on a collision course with express Congressional intent.

Accordingly, Judges Rich and Smith determined that the *Mason* holding should be confined to its facts, and that the protest here involved, grounded on the invalidity of an executive order and not the unconstitutionality of a statute, should be dismissed as untimely.

REASONS FOR GRANTING THE WRIT

The decision below is, we believe, erroneous. It will operate to defeat, to a significant extent, the policies of repose which are embodied in the limitations period found in Section 514 of the Tariff Act. Should that decision, in its broader implications, be followed by other courts, its rationale would have a potentially serious impact on the course of litigation and administration under a variety of federal statutes. Even if not followed elsewhere, the consequences will be to unsettle a number of important matters which,

under the pertinent statutes, were thought to have been finally determined long ago, and to open the agencies whose decisions are reviewed by the Court of Customs and Patent Appeals to an extensive amount of stale litigation.

1. Section 505 of the Tariff Act of 1930 requires an importer to pay the amount of duties determined by the Collector in his "liquidation". Section 515 establishes an administrative and judicial procedure for obtaining a refund of any amount erroneously collected. Section 514, in pertinent respects a typical statute of limitations, makes the liquidation "final and conclusive on all persons" unless the importer initiates administrative and judicial review proceedings within 60 days by filing a protest with the Collector.

Sections 514 and 515 together provide the exclusive mode of review for all claims of erroneous liquidation and overpayment of duties—whether the asserted error was slight or flagrant, factual or legal, within the general area of the Collector's authority or plainly unauthorized. In each of these cases, review under Section 515 must be initiated by filing a protest with the Collector within 60 days of the liquidation. The result should be the same, we submit, whatever the alleged erroneous ground of the Collector's determination—whether he proceeded under an unauthorized Presidential Proclamation, proceeded under an unconstitutional statute, or took action which might be challenged as inconsistent with the statute. In all situations, we submit, review and correction

should follow the procedures and comply with the time limits prescribed in Sections 514 and 515.

The governing principle, we submit, is expressed in the numerous decisions holding that where the legislature prescribes a particular procedure for challenging the action of governmental officials or agencies that procedure must be followed, even where the challenge is upon constitutional grounds. *Bradley* v. *Richmond,* 227 U.S. 477, 485; *First Nat'l Bank* v. *Weld County,* 264 U.S. 450; *Anniston Mfg. Co.* v. *Davis,* 301 U.S. 337, 342–346; *Yakus* v. *United States,* 321 U.S. 414, 434–435. Similarly, where Congress has provided a limitations period as an integral part of a statutory procedure for the assertion of a class of claims, the congressional determination must be accepted and followed even if a claim raises a constitutional issue. *Soriano* v. *United States,* 352 U.S. 270. And it follows *a fortiori* that where, as here, the challenge is not on constitutional grounds, the method of review prescribed by statute—including the limitations period explicitly provided for—should be given controlling effect.

The Court of Customs and Patent Appeals, in its decision in *Mason,* invoked the provision in Section 505 of the Tariff Act which states that the Collector shall "liquidate the rate and amount of duties to be paid on such merchandise as provided by law." The court reasoned that a liquidation based upon an unconstitutional statute was not a liquidation "as provided by law." Therefore, it concluded, in such a situation there existed no valid liquidation which would start the period of limitations set forth in Section 514

of the Act running (51 CCPA at 113). That analysis, we submit, is incorrect and does not effectuate the congressional purpose underlying Section 514's explicit limitations period.

In the first place, it is not at all clear that Congress intended the phrase "as provided by law" to describe anything more than compliance with the procedural requirements relating to liquidation. Indeed, considering the context in which that language appears, it would appear that that was all Congress had in mind. Moreover, as the concurring judges noted, the same rationale that the court below employed in *Mason* and extended in the present case would seem to apply to any improper liquidations made by a Collector, whatever the nature of the error and whenever discovered. For example, if the Collector based his determination on an inapplicable statutory provision, or if he misconstrued a statute or proclamation and thereby improperly classified the merchandise, or if he acted whimsically in choosing a rate, it could also be said that the liquidation was not "as provided by law." The very purpose of the right of action granted importers and consignees by Sections 514 and 515 of the Act is to give them an opportunity to test whether or not the Collector's liquidations are "as provided by law."[3]

[3] The Court of Customs and Patent Appeals in *Mason* relied upon a case holding that where the notice of liquidation was not given, the statute of limitations did not begin to run (see 51 CCPA at 112–113). Obviously, that case is not in point. Where the Collector commits a procedural error which prevents the importer or consignee from bringing a timely action, the government should not be able to take advantage of its own error by interposing the limitations defense. In such a case, the importer or consignee has not "slept" on his rights. But that

Thus, under this statute—as under any similar statute—the administrative decision is an "operative fact" which makes the prescribed limitations period start to run. Cf. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374.

In addition, the language of Section 514 of the Act strongly confirms the correctness of the view we suggest. That section provides that "*all* decisions of the collector, *including the legality of all orders and findings entering into the same,* as to the rate and amount of duties chargeable, and as to *all* exactions of whatever character * * * and his liquidation or reliquidation of *any* entry * * * shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, or refusal, be final and conclusive upon all persons" unless a protest is filed within sixty days after "such liquidation, reliquidation, decision, or refusal * * *." (Emphasis added.) No plainer language could be employed to indicate that *all* determinations of the Collector, regardless of their basis, are to be final and conclusive unless challenged within 60 days.[4]

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principle has no application here, where the consignee had notice of the Collector's liquidation and chose to forego filing a protest within the statutorily prescribed period.

[4] It should be understood that our disagreement with the Court of Customs and Patent Appeals in this case goes to the result, rather than merely to the ground of decision. While it is true that we agree that the case should be dismissed, we disagree with the lower court's dismissal for prematurity. Such a dismissal has the effect of requiring the Collector of Customs to liquidate the entry. The Collector has a mandatory duty under Section 505 of the Tariff Act to liquidate entries. If the prior liquidation was a nullity, he must liquidate the same entry

2. The decision below is inconsistent with well settled principles relating to the construction and application of statutes of limitation. As this Court stated in *Chase Securities Corp.* v. *Donaldson,* 325 U.S. 304, 314:

> Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. * * *

That basic policy has nothing to do with the underlying merits of a claim. A claim may be stale, memories may have faded, witnesses may have disappeared, and evidence may have been lost, all to the same degree where the claim is that a statute is unconstitutional or that administrative action is beyond statutory authority, as where it is based upon some other asserted error in the action giving rise to the claim. The policy is one ingrained in our jurisprudence. It relates no less to attempts to obtain redetermination of the amount of customs duties than to

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again.) Once this is done, the importer may file a protest within 60 days, and the limitations defense—which is the only issue here—would, of course, no longer be open. On the other hand, if the dismissal were for late filing of the protest—the result supported by the two "concurring" judges below—then the Collector would not be required to reliquidate the entry, and the protest would be forever barred. Accordingly, the result of the case is substantially affected; this is not a situation in which the government agrees with the result and contests only the ground of decision.

efforts to litigate any other issue at a time subsequent to when the legislature has decided the matter should be regarded as closed.

No precedent exists for an exception to a limitations period expressly prescribed by statute such as that created by the court below. Indeed, what precedent there is appears to be directly to the contrary. For example in *Kavanagh* v. *Noble,* 332 U.S. 535, a taxpayer filed a refund claim after the expiration of the applicable two-year limitations period, contending that the Collector of Internal Revenue had based his assessment upon a regulation that had been declared "void" two months previously in *Helvering* v. *Janney,* 311 U.S. 189. This Court held the action to be barred, saying (332 U.S. at 538–539):

> It may well be that the taxpayer's refund claim was prompted by this Court's decision in *Helvering* v. *Janney, supra,* which set aside the Treasury regulation upon which the deficiency assessment was based. * * * But assuming that the *Janney* decision makes clear that the taxpayer here made an overpayment, the loss which he now suffers from an application of § 322(b)(1) is a loss which is inherent in the application of any period of limitations. Such periods are established to cut off rights, justifiable or not, that might otherwise be asserted and they must be strictly adhered to by the judiciary. * * *

See also *Leffingwell* v. *Warren,* 2 Black 599, 604–606. Similarly, this Court has held that claims for damages under the "taking" clause of the Fifth Amendment must be filed within the prescribed period of limitations. See, *e.g., Soriano* v. *United States,* 352 U.S. 270.

We recognize that an older decision of this Court categorically stated that an unconstitutional law is "as inoperative as though it had never been passed" (*Norton* v. *Shelby County,* 118 U.S. 425, 442). That case was relied upon by the Court of Customs and Patent Appeals in its decision in *Mason* (51 CCPA at 113), and was again referred to in the opinion below (App. 23). More recent decisions of this Court, however, have reflected a more flexible and realistic approach to the general question of what effect, if any, a holding of invalidity has on earlier decisions made on the basis of the law later held invalid. Thus, in *Chicot County Drainage District* v. *Baxter State Bank,* 308 U.S. 371, 374, this Court stated that "[t]he past cannot always be erased by a new judicial declaration," and indicated that "an all-inclusive statement of absolute retroactive invalidity cannot be justified." Accordingly, the reliance of the court below on the *Norton* case, both in *Mason* and here, seems misplaced.

3. The decision below is of importance both in its immediate application to the customs, patent, and trademark cases within the jurisdiction of the Court of Customs and Patent Appeals and in its potential as a precedent which may be applied to other federal statutes by other courts.

We realize, of course, that this Court denied certiorari in the *Mason* case in 1965. But, it should be noted, the refusal by the Court of Customs and Patent Appeals in *Mason* to apply the statutory 60-day limitations period to liquidations under unconstitutional statutes had only a limited, immediate application. That was so because—as we pointed out in our peti-

tion for certiorari in *Mason* (p. 12)—decisions holding tariff statutes unconstitutional are rare. The present decision, however, has a much wider application. Four Presidential Proclamations setting duties have been declared "void" in recent years, and in each case the proclamation had been in effect for several years before the adjudication of invalidity.[5] It is anticipated that, if the decision below stands, other importers of merchandise subject to these proclamations will also attempt to take advantage of the holding below. Indeed, tariff duties are frequently established by means of a Presidential Proclamation.[6] Moreover, the rationale of the decision below would presumably be applied by the court below to patent and trademark cases as well. Another unsettling aspect of the decision is that it opens the door to attacks upon countless tariff proclamations which are not even currently operative and permits indefinite delay in challenging proclamations now on the books.

In addition, the significance of the principle announced by the court below obviously transcends cus-

[5] Presidential Proclamation No. 3211 (T.D. 54493), settting duties upon clothespins, was held void in *Falcon Sales Co.* v. *United States*, 47 Cust. Ct. 129; Presidential Proclamation No. 3108 (T.D. 53883), establishing duties on bicycles, was declared void in *United States* v. *Schmidt Pritchard & Co.*, 47 CCPA 152; Presidential Proclamation No. 3084 (T.D. 53755), on shelled peanuts, was held invalid in *United States* v. *The Best Foods, Inc.*, 47 CCPA 163; and Presidential Proclamation No. 3095 (T.D. 53808), also relating to peanuts, was declared invalid in *The Best Foods, Inc.* v. *United States*, 50 Cust. Ct. 94, C.D. 2396.

[6] For example, the "Kennedy Round" of tariff modifications was put into effect by Presidential Proclamation. 32 Fed. Reg. 19002–19149 (December 19, 1967).

toms litigation. Section 514 of the Tariff Act of 1930 is a typical statute of limitations, dating the period for bringing a claim based on the error of a government official or agency from the time the official action was taken. Reasoning identical to that adopted below could equally be asserted as the justification for entertaining suits otherwise barred under numerous other federal statutes granting a right of action to remedy the erroneous decision of a federal official or administrative agency. All that would be required is a contention that the official or agency had acted on the basis of an unconstitutional statute or regulation, or had acted beyond the authority granted by statute. It is hardly conceivable that Congress intended such a result.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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MAY 1968.

APPENDIX A

United States Court of Customs and Patent Appeals

October Term 1967

Customs Appeal No. 5263

THE UNITED STATES, APPELLANT

v.

CAJO TRADING, INC., APPELLEE

February 15, 1968

WORLEY, Chief Judge.

The Government alleges reversible error in the judgment of the Customs Court, First Division,[1] which held that liquidation of certain spring clothespins assessed at a duty of 20 cents per gross under paragraph 412 of the Tariff Act of 1930, as prescribed by Presidential proclamation No. 3211, 72 Stat., part 2, ch. 14, T.D. 54493, was defective; that the protest respecting the entry was premature; and that it was the duty of the collector to make a valid liquidation of the entry in accordance with law.

On December 7, 1957, Presidential proclamation No. 3211 suspended previously granted Trade Agreement concessions on spring clothespins, classified under paragraph 412 and dutiable at 10 cents per gross according to the Trade Agreement, and restored

[1] *Cajo Trading, Inc.* v. *United States*, 56 Cust. Ct. 143, C.D. 2621 (1966).

the pre-Trade Agreement duty of 20 cents per gross. The instant clothespins were entered December 27, 1957, and liquidated March 13, 1958. Subsequently, the Presidential proclamation was declared void by the Customs Court in *Falcon Sales Company et al.* v. *United States,* 47 Cust. Ct. 129, C.D. 2292 (1961), appeal dismissed on Government motion, 49 CCPA 139 (1962). There the court held that the President had exceeded the authority delegated to him by Congress in restoring the pre-Trade Agreement rate rather than following the required course of either accepting or rejecting the Tariff Commission recommendation to place a quota on clothespin importations.

In January 1963, the importer here requested the collector to liquidate the subject entry at a duty of 10 cents per gross on the grounds that the 1958 "liquidation" was void in view of *Falcon Sales.* The collector refused on the ground that the liquidation of March 13, 1958, not having been protested within the time provided by Section 514,[2] had become "final and conclusive on all persons." That ruling was reversed by the Customs Court, holding that *United States* v. *C. O. Mason,* 51 CCPA 107, C.A.D. 844, certiorari denied, 379 U.S. 999, was *stare decisis* of the present appeal. The correctness of that holding is the issue before us.

Mason involved coffee imported into Puerto Rico from 1957 through 1959[3] and liquidated between 1957

[2] Section 514 provides that a liquidation, reliquidation, decision of the collector, or his refusal to reliquidate an entry for clerical error shall be final and conclusive upon all persons unless the importer, consignee, or agent "*shall, within sixty days after, but not before such liquidation,* reliquidation, decision, or refusal, as the case may be, * * * file a protest in writing with the collector * * *." [Emphasis supplied.]

[3] Assessed under Section 319 of the Tariff Act of 1930 and an Act of July 11, 1935, of the Legislature of Puerto Rico, as

and 1959, the protests being filed in 1960, all beyond the 60 day period provided in Section 514. The ground for the protests in *Mason* was the holding of the Customs Court in *Pan American Standard Brands, Inc.* v. *United States*, 43 Cust. Ct. 122, C.D. 2115, decided September 15, 1959. There the court held unconstitutional as an unlawful delegation of legislative power a provision of Act No. 95 of the Legislature of Puerto Rico.

In *Mason* this court unanimously agreed with the Customs Court that

> * * * the provision of Act No. 95 under which the liquidations were made, having been found unconstitutional, was not a law; that it was inoperative and afforded no basis for the alleged liquidations and subsequent protests; that its invalidity dates from the time of enactment; and that although in some situations, where a statute is declared to be unconstitutional, there may be questions of vested rights and of public policy which cannot be erased by a new judicial determination, no such factors have been presented in the cases at bar. * * *

Here the importer urges that the instant liquidation is equally void as in *Mason;* that the Customs Court correctly held the protest premature; and that it is the duty of the collector to make a valid liquidation of the present entry in accordance with law. The Government, on the other hand, urges that *Mason* is not applicable, and that the protest should be dismissed for untimeliness since the importer failed to act within the 60 days set by Section 514.

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amended by a resolution of the Secretary of Agriculture and Commerce of Puerto Rico, approved by the Governor of the Commonwealth of Puerto Rico April 18, 1957, under authority of Act No. 77, approved May 5, 1931, as amended by Act No. 95 of June 21, 1955.

In evaluating the instant record and arguments, the Customs Court stated that it was "unanimously of the opinion that it can suggest no rational distinction, between the situation in *Mason* and the one at bar, sufficient to justify not following it," adding that

> If a liquidation based on an unconstitutional statute is void, one founded on an unauthorized Presidential proclamation appears equally so. * * *

We find no error in that reasoning or conclusion. The Government urges, however, that the authority in support of "the voidness doctrine" enunciated in *Mason* "clearly restricts its application to unconstitutional statutes." It further contends:

> * * * There is not before this Court any question of an unconstitutional statute or executive action. In the *Falcon* decision, the Customs Court adverted solely to the powers regularly conferred upon the President by a statute of unquestioned constitutional validity. Even if the Supreme Court's expression does establish the "total voidness" of a statute found to be constitutionally unsound, and we submit that this Court did not so intimate in the *Mason* decision, it does not declare that an executive action, incapable of affecting rights and obligations automatically, infects all other executive acts, however remotely connected with it, with "total voidness," alike as to those who timely challenge it and to those who neglect to do so. The executive act before the Court is not the issuance by the President of the proclamation restoring the higher rate of duty on spring clothespins, but the act of the Collector in effecting a liquidation of the specific entry here in issue, an act undertaken under statutory authority (i.e., section 505 of the Tariff Act of 1930), which is beyond challenge here, and which in fact defines not only the Collector's authority but his obligation.

It is true that *Norton* v. *Shelby County,* 118 U.S. 425 (1886), the authority principally relied on in *Mason,* relates to an unconstitutional legislative act which was held void on the premise that "[a]n unconstitutional act is not a law" and is "as inoperative as though it had never been passed." We have reviewed *Mason* in light of the Government's arguments here but remain convinced of its soundness. There, as here, Section 514 was involved as reflected by the following:

> * * * we think that a liquidation based on an *unconstitutional* provision of a *statute* is not a final legal liquidation to start the running of the statute of limitations within the purview of section 514.
>
> * * * * *
>
> What, then, is the proper case which *Congress intended will stay the 60-day requirement?* * * * [Emphasis supplied.]

Presumably a literal interpretation of Section 514 in *Mason* to ascertain Congressional intent would have required an opposite result. Here, too, a literal interpretation of that section would remove *Mason* as *stare decisis* of the instant appeal, but there is nothing in this record which justified a different interpretation. While it may well be that there is a material difference between the collector's action here and his action under a *constitutional* statute or a *valid* Presidential proclamation, that question is not before us. What we do say here is that we have the same difficulty as did the Customs Court in finding a valid distinction between an unconstitutional statute on the one hand, and an invalid Presidential proclamation on the other—the effect is the same in both cases. With due regard to the Government's arguments, we do not

think it can fairly be said that Congress intended Section 514 to control in either instance.

The judgment is *affirmed.*

AFFIRMED.

RICH, Judge, concurring, with whom SMITH, Judge, joins.

I am unable to agree with the majority's opinion. The majority, like the Customs Court, boxes itself in by the force of what it considers an inexorable logic and holds it is bound by the decision in *United States* v. *C. O. Mason, Inc.*, 51 CCPA 107, C.A.D. 844, to find here that the protest was "premature" because the liquidation was "defective." Preliminary to further discussion, the facts should be made clear.

This "premature protest" here under review was filed April 5, 1963, to a so-called "decision" of the collector dated February 12, 1963, i.e., within 52 days. The collector *liquidated* the entry of the imported spring clothespins five years before that, on March 13, 1958, at 20¢ per gross. *No protest has ever been filed against this liquidation.* Section 514 of the Tariff Act of 1930, then as now, requires protests to be filed wthin 60 days of liquidation. That statute provides that in the absence of protest within 60 days, a liquidation shall "be final and conclusive upon all persons (including the United States and any officer thereof) * * *."

October 18, 1961, the United States Customs Court handed down a decision in *Falcon Sales Co.* v. *United States*, 47 Cust. Ct. 129, C.D. 2292, appeal dismissed on motion of the Government-appellant, 49 CCPA 139. That case also involved an importation of spring clothespins. Duty was assessed at 20¢ a gross under authority of a Presidential proclamation, No. 3211,

which had suspended for an indefinite period the 10¢ rate in effect under the Annecy Protocol to GATT, subsequent to a finding of the Tariff Commission that the 10¢ rate was adversely affecting the domestic industry and a recommendation for an annual absolute *quota* of spring clothespins. The Customs Court found, in accord with the plaintiff's contentions, that the President's suspension of the 10¢ duty, when the Tariff Commission had recommended imposition of a quota, exceeded his authority, that his action was therefore void, and therefore that the 10¢ per gross duty in effect when the President attempted, without proper authorization, to change it, was the proper duty. There was no issue in that case regarding the timeliness of the protest. The protest was sustained.

The action of the importer which is herein being treated by the collector as a "protest" is a letter of appellee's attorneys of February 12, 1963, a year and a half after the *Falcon* decision, asking the collector *to liquidate* the importation of clothespins. It was and is appellee's theory that the entry had *never been* liquidated because the liquidation in 1958, at 20¢ a gross, was made pursuant to a Presidential proclamation which was "void" because in excess of statutory authority, as held in *Falcon,* and, says appellee, "a void act is an act which has never been done; it doesn't exist at all." It will thus be seen that we are in the realm of highly abstruse legal theory according to which liquidation is requested—not reliquidation—on the ground that an actual 1958 liquidation, being contrary to "law," is non-existent. If this legal theory can be made to stick, then appellee contends it is not in default under the statute which says anyone wishing to protest a liquidation must do so within 60 days because, according to the theory, there has not yet been a liquidation.

In passing on the soundness of this legal theory as applied to the facts of this case, it should be emphasized that the sole issue is whether this case may proceed on the basis that appellee is not barred by its failure to file a timely protest, under section 514.[1]

[1] I use the expression "this case may proceed" advisedly. By it I mean that the question is whether appellee can compel the Government to "liquidate" on the theory it has not done so; that after such a second de facto liquidation it may then file normal protects thereto under section 514 and obtain an adjudication thereon, should it desire to do so.

The case is in this posture because the so-called "protest" before us is not a protest in the usual sense of a protest to a liquidation. It is merely an appeal from the collector's refusal of appellee's demand for a new liquidation based on a theory that the old liquidation is a nullity.

The status of this so-called protest is somewhat enigmatic. It has been "dismissed" by the judgment of the Customs Court. Normally, this would make the protesting party the loser. But here it is the winner and the government, against whom the protest was filed, is the appellant in this court. As it pointed out in a motion below for rehearing, the judgment does not conform to the lower court's opinion.

The "protest" here, filed April 3, 1963, to a refusal to liquidate dated February 12, 1963, was within 60 days. Yet the judgment of the Customs Court, read in the light of its opinion, dismisses the protest as premature, at the same time ruling in its opinion, but not in its judgment, that the collector still has the duty to make a valid liquidation. That liquidation would, if it conforms to the *Falcon* decision, be based on a duty of 10¢ per gross and appellee would get what it seeks and would, presumably, not file a protest. It would get the 10¢ duty *without ever having protested the 20¢ duty* originally charged. The latter determination of duty by the collector, by whatever name it is called, would never have become "final and conclusive" against anybody, as section 514 provides.

In *Falcon* the importer filed a *timely* protest and had it *sustained*, getting its duty reduced from 20¢ to 10¢. Now the appellee, *having itself failed to take such action*, hopes to *accomplish*, belatedly, a similar result on its legal theories, without filing any protest at all, by demanding a new liquidation. Whether it can do this is the real problem before us.

The question of the validity of the Presidential proclamation is not in issue as it was in *Falcon*. Invalidity is assumed.

In dealing with the issue of whether the so-called protest in this case (i.e., the letter requesting liquidation) came too late, so that it must be dismissed on that ground, or whether it comes too soon so that it must be dismissed as "premature," the lower court opinion is unusual in that it first reports the unanimous view of the court and then goes on to state the individual views of the author. The unanimous view of the court was reported by him to be that it could "suggest no rational distinction" from its prior decision, affirmed by us in 1964 in *United States* v. *C. O. Mason, Inc.*, supra. In that case we held (p. 113):

> * * * we think that a liquidation based on an *unconstitutional* provision of a *statute* is not a final legal liquidation to start the running of the statute of limitations within the purview of section 514.
>
> * * * * *
>
> What, then, is the proper case which Congress intended will stay the 60-day requirement? It seems to us that a liquidation based on an *unconstitutional* provision of a *statute* would certainly involve such a case since an *unconstitutional* provision of a *statute* is void *ab initio*. [Emphasis added.]

That is all we held since that was the only question we considered. Here we have a different question. The constitutionality of the statute here involved has not been questioned. Here the President, acting as an administrative agent, purportedly under the statute, attempted to make a change in duty which he was not authorized by the statute to do. His only power was to accept or reject the recommended quota.

The author of the lower court opinion—and probably the whole First Division of the court—saw that there was a factual difference between this case and *Mason*. Seeing it, he recognized that in applying the doctrine of *stare decisis* he was not applying it in the strict sense (for that which has *not* previously been decided is *not* controlled by the doctrine of *stare decisis*) but was applying it to a new situation and therefore making "another step forward, however short, for the concept of void liquidations." He had real misgivings about where such steps would lead. He said:

> By such easy stages, it could end up with complete or nearly complete occupation of the field of sections 514 and 515, Tariff Act of 1930, so that the provisions limiting valid protests to 60 days after liquidation would be largely superseded, and an importer could obtain the effect of a timely protest *no matter when he filed it.* [Emphasis added.]

When the effects of such step-by-step legal escalation are so clearly pointed out and the dangers so obvious, it behooves us to contemplate with care where "logic" and a supposed inability to make "rational" or "valid" distinctions leads. As Mr. Justice Holmes said in *Hyde* v. *United States,* 225 U.S. 347, 391 (1912),

> It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.

The phrase in which an idea is here about to be encysted is "liquidation 'as provided by law'," taken from our *Mason* opinion. We used that phrase in rationalizing the decision in a case involving an *unconstitutional statute.* We were discussing nothing else. We are now being asked to apply it to a different situation, not involving an unconstitutional stat-

ute. And the next thing we know—if we affirm here—we will be asked to apply it to cases in which collectors have classified goods in the wrong statutory class and appraisers have valued them according to the wrong section of the statute, or have assessed them at the wrong value. This is where simple "logic" leads and the absurdity into which we can lead ourselves by "inability" to see that different things are not the same. For it is indisputable that all such erroneous liquidations by collectors and valuations by appraisers are not "as provided by law." That was clearly foreseen by the author of the opinion below who seems to have been inviting us, as the court approving the *Mason* decision, to state whether we shall stop with *Mason,* extend it to the present facts, or let it go still another step or two. He said:

> The doctrine needs to be restated to limit it to the cases where the courts have already applied it and to give assurance that in other cases the *wishes of the Congress as expressed in sections 514 and 515 will continue to be respected.* [Emphasis added.]

The majority here, voicing "difficulty" in seeing a "valid distinction between an unconstitutional statute on the one hand, and an invalid Presidential Proclamation on the other," said it did "not think it can fairly be said that Congress intended Section 514 to control in either instance." We do not have the slightest indication of Congressional "intent" as to either situation but we do have the express mandate of Congress in section 514 that protests to actions of collectors which are displeasing to importers shall be filed within 60 days or they shall "be final and conclusive on all persons." That is what Congress intended. It is we who created an exception.

We have gone so far as to make a judicial (not Congressional) exception in the case of unconstitu-

tional statutes. Now that it has been shown to us by the judge below and the Government brief where so-called "logical" extensions of that exception clearly lead, it behooves us to stop where we are and make no further exceptions, for we are on a collision course with express Congressional intent.

As Mr. Justice Holmes also said in the first paragraph of *The Common Law,* "The life of the law has not been logic: it has been experience. * * * The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; * * *."

Appellee, at the trial level, saw the distinction between this case and *Mason,* which the majority has such apparent difficulty in assimilating. It realized *Mason* was a case of an unconstitutional statute and that this case is not. Its brief in this court, in an attempt to bring this case within *Mason,* is an heroic effort to makes this case out to be one of an "unconstitutional" act by the President, underlying the collector's 1958 liquidation. It is also interesting to note that in the trial, where there was argument over a Government motion to set aside the notice of trial (which was denied), counsel for appellee repeatedly took the express position that this case involves a *different* issue from the *Mason* case. He was not then committing himself to the result in the *Mason* case, which was on appeal to this court and was not finally decided until a year later. He said:

> I am here to say it involves a different issue. Whether it is a distinguishable issue will be one for adjudication of this Court, and perhaps later, the Court of Customs and Patent Appeals.

Since our *Mason* decision turned out to be an affirmance, appellee now, of course, heavily relies on it and attempts to transmute the different issue into an in-

distinguishable issue in order to enable him to demand new liquidations nearly 5 years after liquidations have been made so that there will be no default under section 514. Congress *said* he should have acted within 60 days to obtain a review and I think it intended just that.

I agree with the majority that this case should be dismissed. I disagree with the majority's reasons. If appellee's protest were, in fact, against the liquidation of March 13, 1958, I would dismiss it as too late. The protest, however, was directed against the *refusal to liquidate* "evidenced by the letter * * * dated February 12, 1963." Protests of such refusals are not, in my opinion, within the jurisdiction of the Customs Court. See 28 USC 1583 (1964). I would therefore dismiss this case as without jurisdictional foundation.

APPENDIX B

United States Customs Court

(C.D. 2621)

CAJO TRADING, INC.

v.

UNITED STATES

* * * *

United States Customs Court, First Division

Protest 63/7627/5002/63 against the decision of the collector of customs at the port of New York

* * * *

(Decided March 1, 1966)

* * * *

Before OLIVER, WILSON, and NICHOLS, Judges

NICHOLS, Judge: This case involves clothespins assessed with duty at 20 cents per gross under paragraph 412 of the Tariff Act of 1930, as prescribed by a Presidential proclamation (No. 3211, 72 Stat., part 2, ch. 14, T.D. 54493) held to be unauthorized by law. *Falcon Sales Company et al.* v. *United States*, 47 Cust. Ct. 129, C.D. 2292, appeal dismissed 49 CCPA 139. Plaintiff failed to protest within 60 days after the liquidation or purported liquidation of the entry, as section 514 of said tariff act seems to require.[1] Having

[1] Section 514 provides that a liquidation, reliquidation, decision of the collector, or his refusal to reliquidate an entry for clerical error shall be final and conclusive upon all persons unless the importer, consignee, or agent "shall, *within sixty days after, but not before* such liquidation, reliquidation, decision, or refusal, as the case may be, * * * file a protest in writing with the collector * * *." [Emphasis supplied.]

requested a reliquidation after our decision, it protested the refusal of the collector to reliquidate. To sustain its right to obtain review in these circumstances, plaintiff relies on the doctrine announced by our appellate court in *United States* v. *C. O. Mason, Inc., etc.*, 51 CCPA 107, C.A.D. 844, *certiorari* denied, 379 U.S. 999, affirming certain decisions of our third division. That is that a liquidation is "void" if made at a rate prescribed under authority of an unconstitutional statute, and a void liquidation does not start the 60-day period of section 514 running. The collector is declared to be still legally obligated to liquidate and, as he has not done so, the protest is called premature. Still, even this premature protest was apparently effective to enable the court to pronounce upon the substantive issues involved, notwithstanding the attempt of section 514 to limit effective protests to those made after liquidation.

If *Mason* applies to the instant case, the delay in protesting is excused, and, as the invalidity of the proclamation is not now in issue, the *Mason* procedure must be followed. If *Mason* does not apply, the protest came too late and must be dismissed, leaving the liquidation in effect.

In *Mason, supra,* the invalidity was in the order of a Puerto Rican official raising duties on coffee imported into Puerto Rico under an unconstitutional delegation to him by the Commonwealth legislature. Here it is in a proclamation of President Eisenhower restoring 1930 act rates on clothespins when the Tariff Commission, in an escape clause proceeding, had recommended only a quota. We held in *Falcon Sales Company et al.* v. *United States, supra,* following *United States* v. *Schmidt Pritchard & Co., Mangano Cycles Co.*, 47 CCPA 152, C.A.D. 750, *certiorari* denied, 364 U.S. 919, that the President was authorized only to

accept or reject Tariff Commission recommendations, not devise new remedies of his own.

The court is unanimously of the opinion that it can suggest no rational distinction, between the situation in *Mason* and the one at bar, sufficient to justify not following it. Therefore, it must be followed. A majority believe it is unnecessary to speculate on the ramifications of the *Mason* rule. I share their distaste for needless dissertation and would, like them, prefer to await the arising of actual cases. However, the situation here is in some ways unusual.

I had no part in framing the *Mason* rule and am not sure I am competent to expound it. Hence, except for the invocation of *stare decisis,* I do not supply herewith the rationalization and generalization appropriate to a judicial opinion and normally considered it determining when that decision is *stare decisis* in new situations.

Evidently, the situation here is another step forward, however short, for the concept of void liquidations. By such easy stages, it could end up with complete or nearly complete occupation of the field of sections 514 and 515, Tariff Act of 1930, so that the provisions limiting valid protests to 60 days after liquidation would be largely superseded, and an importer could obtain the effect of a timely protest no matter when he filed it. If a liquidation based on an unconstitutional statute is void, one founded on an unauthorized Presidential proclamation appears equally so. That is the step we take here. How about a liquidation purportedly based on a nonexistence statute? Or on one that exists, but we hold has no application to the case at bar?

Certainly it seems to me, in the case last supposed, a strong argument can be made that the liquidation was not made "as provided by law." See *Mason,*

supra, at page 113. However, it will be readily seen that the sustaining of the importer's protests in most cases when they are sustained, would involve a like holding. It would follow that the dismissal of such a protest as premature would become the most common disposition whenever the claim in the protest is sustained.

I do not think my colleagues will want to go that far when the case arises, though I am unable to anticipate how they will justify not doing so. If my premonitions are correct, what we do today will be invoked by counsel as *stare decisis* for that extension, just as we are invoking it today. Therefore, it may well be that we have already gone far enough to interfere with the normal flow of protests through protest review by the collector, and transmission to this court, which the Congress envisioned. I can see some practical reasons for dispensing with timely protest and protest review in the actual cases of unconstitutional statutes and invalid proclamations, which do not apply in the case I have merely supposed. But these reasons form no part of any existing statement of the void liquidation doctrine. The doctrine needs to be restated to limit it to the cases where the courts have already applied it and to give assurance that in other cases the wishes of the Congress as expressed in sections 514 and 515 will continue to be respected. The next proposed extension will, I think, make that restatement unavoidable, and I regret the majority is not willing to undertake it here.

For the reasons stated, we hold that the 60-day rule is inapplicable to this case; that the liquidation is defective, the protest premature, and that it is the duty of the collector to make a valid liquidation in

accordance with the law. The protest must be dismissed.

Judgment will be entered accordingly.

PHILIP NICHOLS, Jr.
J.

Concurring:
W.J.O.
J.
D.J.W.
J.

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No. [redacted] 104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES OF AMERICA,
Petitioner

v.

CAJO TRADING, INC.

On Petition for a Writ of Certiorari to the United States Court of Customs and Patent Appeals

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1440

UNITED STATES OF AMERICA,
Petitioner

v.

CAJO TRADING, INC.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Respondent prays that the Petition for a Writ of Certiorari filed by the Solicitor General on behalf of the United States be denied.

OPINIONS BELOW

The Customs Court, First Division (56 Cust. Ct.) 143, C.D. 2621, the Court of Customs and Patent Appeals (2 Cust. Bull. No. 10, p. 78, March 6, 1968) both held for the Plaintiff (the Respondent here). See Appendix Petitioner's Petition.

JURISDICTION

The judgment of the Court of Customs & Patent Appeals was entered on February 15, 1968. A timely petition for

Writ of Certiorari was filed by the United States on May 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1256.

QUESTIONS PRESENTED

1. *On Petition For Writ:* Whether the decision below is in conflict with decisions of this Court; whether there is a conflict in the decisions of the Court below, and whether a substantial federal question of substance is involved.

2. *If Writ is Granted:* Whether a "liquidation" by the Collector of Customs of an entry of imported articles in accordance with a void Executive Order of the President is a liquidation as required by law which becomes final under Sec. 514 of the Tariff Act of 1930 if not protested in writing with the Collector within 60 days after the Collector's action. In essence, if the writ is granted, the question is whether a liquidation pursuant to a void duty rate (the Presidential Proclamation being an exercise of a legislative function properly delegated but improperly exercised) is also void.

STATUTES INVOLVED

The relevant provisions of the Tariff Act of 1930, 46 Stat. 732, 19 U.S.C. 1505 are set forth at pages 2 and 3 of the Petition.

STATEMENT

The merchandise involved here, consisting of spring clothespins, was liquidated by the Collector of Customs at New York on December 27, 1957, and the duties were assessed at the rate of 20 cents per gross as directed by Presidential Proclamation No. 3211 (T.D. 54493). No protest was filed by the Respondent against this liquida-

tion within the 60 day limitation period prescribed by Section 514.

Thereafter, on October 18, 1961, the Customs Court, First Division, in its decision in *Falcon Sales Co.* v. *United States*, 47 Cust. Ct. 129, C.D. 2292, held that Presidential Proclomation No. 3211 was "void." Accordingly, it held that the 20% rate of duty applied by the Collector was not the proper rate of duty but that instead the duty rate should have been 10% per gross prescribed by an earlier legally issued Presidential Proclamation.

The decision in *Falcon Sales*, not having been appealed, Respondent on January 25, 1963, believing the December 27, 1957 Collector's liquidation to be as void as Presidential Proclomation No. 3211 had been held to be, served on the Collector a written demand to liquidate the entry as provided by law. The Collector refused to do so and Respondent filed the protest which has given rise to the present litigation.

Respondent's position that a valid liquidation had never taken place and that the entry should be liquidated as provided by law at the valid duty rate of 10¢ per gross was upheld by the Customs Court. That Court concluded that there had been no valid liquidation because the December 27, 1957 "liquidation" was pursuant to a *void* Presidential Proclamation. Accordingly, the Respondent's protest was dismissed as premature (protests may be filed only after a liquidation "as provided by law" has taken place), the Court holding that the Collector was under an obligation to liquidate the entry "as provided by law" under Sec. 505 of the Tariff Act of 1930.

In reaching its decision, the Customs Court relied on *United States* v. *C. O. Mason, Inc.*, 5 CCPA 107, CAD 994, certiorari denied 379 U.S. 399, 13 L. ed. 2d 701 (1965). In that decision the Court of Customs and Patent Appeals held that the Sec. 514 sixty-day protest provision did not apply to a liquidation under a statute *later* held to be un-

constitutional, because the *voidness* of the statute made the subsequent liquidation *equally void.*

In the decision of the Customs Court in the present litigation, the Court found there was no valid distinction between a liquidation based on an unconstitutional statute and one based, as here, on an unconstitutional Proclamation of the President issued pursuant to the Trade Agreements Extension Act—both were equally void.

The United States appealed that decision to the United States Court of Customs and Patent Appeals. By a divided 3-2 opinion,[1] that Court affirmed the decision of the lower Court, (Petitioner's Brief, App. 23-24) saying:

> "We have the same difficulty as did the Customs Court in finding a valid distinction between an unconstitutional statute on the one hand, and an invalid Presidential proclamation on the other—the effect is the same in both cases. * * * we do not think it can fairly be said that Congress intended Section 514 to control in either instance."

The United States now petitions for issuance of a Writ of Certiorari permitting this Court to review the decision below. It relies primarily on the contention that the decision may be applied in matters far beyond the limited field of customs law and the provisions of Sections 505 and 514 of the Tariff Act of 1930.

REASONS FOR DENYING THE WRIT

The decision of the Courts below was a just one and to reverse it would violate basic principles of justice and fair play.

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[1] The opinion of each of the five Judges of the CCPA was that the Appellee's protest should be dismissed, the majority holding it should be dismissed because it was filed *in advance of any valid liquidation* having occurred and the minority holding that it should be dismissed because it was filed more than 60 days after the December 27, 1957 liquidation which took place pursuant to the void Presidential order as to the rate of duty to be applied to entries of the article involved.

Rule 19 of the Rules of this Court specifies the considerations which are to govern Review on Certiorari. The case at hand does not qualify for review by this Court.

(a) The question involved is not a question *of substance*, or a case decided contrary to applicable decisions of this Court.

(b) The decision below is not in conflict with the decisions of the Court of Customs and Patent Appeals, the only appellate court dealing with customs problems. Instead, the decision is in accordance with that Court's decision in *Mason*.

(c) The issues do not involve a state or territorial question.

(d) The decision below does not involve an important question of federal law.

(e) The decision below has not decided a federal question in a way in conflict with any decision of this Court.

(f) The decision below does not depart from any accepted and usual course of judicial proceedings.

ARGUMENT

Unauthorized acts of government officials often have a substantially damaging effect on the citizens affected. When such an act takes place, the government and the courts should minimize and not perpetuate this damage. To hold that a liquidation based on a void act of the President is valid because a statute of limitations barred any question regarding the validity of that liquidation would be to give validity indirectly to what is otherwise invalid. Some might require a man lift himself by his bootstraps, but not the Courts where justice cannot thereby be served.

In order to induce the Court to grant certiorari the Petitioner argues that the decision of the Court below and

the principles therein enunciated may be applied in a variety of circumstances—some in the area of customs law not involving void statutes and void Presidential Proclamations and some far afield. Petitioner erroneously assumes:

(a) That the decision of the court below would apply to all improper liquidations made by the Collector.

(b) The decision is of importance as a precedent to federal statutes other than the customs statutes, including patent and trademark cases.

On the basis of these assumptions the Petitioner argues that the decision involves an important federal question of substance, i.e., the maintenance of the validity of the specific terms of all federal statutes of limitations.

We submit that both the assumptions made by Petitioner and the conclusions drawn therefrom as to the federal question involved and its importance are unjustified.

Both the Customs Court and the majority of the Court of Customs and Patent Appeals could find no distinction between the case at hand and the decision in *Mason, supra.* In other words, neither found any distinction between a liquidation by the Collector *under a void* statute and one under *a void Presidential Proclamation.* The Customs Court expressed concern about whether its decision in the case at hand was an extension of the *Mason* decision relating to a void statute and the minority in the Court below believed it to be an unjustified extension, the implications of which could not be readily determined.

But the decisions of both Courts were right. There is no distinction. *Mason* held that a liquidation under Sec. 505 under a void statute was not a liquidation "as provided by law." The statute, being void *ab initio*, all things flowing therefrom were obviously void for they were not "as provided by law."

The case here involves a liquidation pursuant to a void Presidential proclamation adopted pursuant to a Trade Agreements Extension Act. While the proclamation was issued by the President, he was acting in assistance of the Legislative Branch, and the proclamation partook of the nature of legislation in that it sought to establish a new rate of duty, something reserved to the Congress under Article I, Sections 1, 7 and 8 of the Constitution.

But it has long been held by this Court that the Congress may properly delegate to the Executive Branch of the Government the determination of a lawful rate of duty to be applied by the Executive pursuant to declared congressional policies and according to congressionally established standards. As this Court, speaking through Mr. Justice Hughes, put it in *Panama Refining Co.* v. *Ryan,* 293 U.S. 388, at p. 421, 79 L. ed. 446 (1935) the Congress is vested exclusively with legislatively powers under the Constitution, and

> "manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility . . . ."

The exercise of the delegated power (within the standards and pursuant to the policies declared by the Congress) is, according to Justice Douglas, but "*one stage of*

the legislative process" both "*in substance and to a great extent in form.*" [Emphasis added.] *United States* v. *Bush & Co.*, 310 U.S. 371, 379, 84 L. ed. 1259 (1940). In *Norwegian Nitrogen Prod. Co.* v. *United States*, 288 U.S. 294, 77 L. ed. 796 (1933) Justice Cardozo, in discussing the congressionally authorized process of the initiation of an increased rate of duty by means of a Presidential Proclamation after receipt of Tariff Commission advice, pointed out (P. 305):

> "What is done by the Tariff Commission and the President in changing the tariff rates to conform to new conditions *is in substance a delegation, though a permissible one, of the legislative process.* [Emphasis added.] *Hampton Jr. and Co.* v. *United States*, 276 U.S. 394, 72 L. ed. 624, 48 S. Ct. 348; *Buttfield* v. *Stranahan*, 192 U.S. 470, 48 L. ed. 525, 24 S. Ct. 349; *Field* v. *Clark*, 143 U.S. 649, 36 L. ed. 294, 12 S. Ct. 495. The inference is, therefore, a strong one that the kind of hearing assured by the statute to those affected by the change is a hearing of the same order as had been given by congressional committees *when the legislative process was in the hands of Congress and no one else.*"

In the decision in *Hampton, Jr. and Co.* cited in the above quotation from the opinion of Judge Cardozo, Chief Justice Taft said at page 409:

> "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."

In referring to the decision of this Court in *Hampton, Jr., supra*, the Court of Customs, in commenting on the constitutionality of a power delegated by Congress to the President to set rates of duty under prescribed circumstances, pointed out:

> "In its essentials, it required on the part of the Congress the establishing of certain criteria to guide

the President and the prescribing of certain limits of change. On the part of the President it required the completion of certain conditions precedent and the use of a proclamation *to effect the change in the law.*

"It is not open to doubt that, in the case of the flexible tariff provisions, it is the proclamation of the President which changes *the law.* The President, acting as the agent of the legislature, proclaims new tariff rates. *The proclamation is akin to the legislative act.* It is not merely declaratory of a situation which exists without it—*it is the law itself.*

"As has been said, the use of the device of delegating authority to the President to change tariff rates under an intelligible principle and in accordance with certain conditions and limitations was incorporated into the Trade Agreements Act and into the extensions thereof here involved. Retained as a basic and integral part of the device was the requirement that the President *proclaim the modifications of duties,* restrictions upon imports, or customs or excise treatment of articles covered by foreign trade agreements. The Act refers, not to the 'agreed' duties and other import restrictions, but to the 'proclaimed' duties and other import restrictions, a clear indication that Congress considered the trade agreement to be in the nature of a condition precedent to the issuance of a valid proclamation, *but that the change in the law is effected, not by the trade agreement, but by the proclamation. By this means, not only is the inherently legislative character of the act preserved,* but also the constitutional separation of powers is maintained." *American Bitumuls & Asphalt Co., et al* v. *United States,* 37 U.S. Cust. Rep. 58, 63, CD 1799. [Emphasis in part supplied.]

The legislative nature of an act of the executive for which there is no authority other than the delegation of legislative power is also confirmed by the opinion of Chief Justice Taft in *Mahler* v. *Eby,* 264 U.S. 32 at page 44, 44 Sup. Ct. 283, 68 L. ed. 549:

> "It is essential that when the executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise . . ."

Essentially, therefore, a Presidential action such as Proclamation 3211 under which the merchandise in this appeal was allegedly liquidated, was legislative in nature, albeit an action of the Executive within the powers delegated to the Executive by the Congress. And in this lies a rational identification with the unconstitutional statute situation involved in *Mason*. Also—in this fact lies the essential difference between the case at hand and the much broader circumstances Petitioner asserts the decision below could be extended to, such as mistakes by the Collector, whimsical actions by an administrative official in the field of patents and trademarks and in fact all federal statutes of limitations.

When the Collector mistakenly classifies merchandise under a wrong section of the statute, his action is not legislative in nature. He had no delegated authority to change the law—his decision is not law. The President, however, under the Trade Agreements Extension Act, was authorized to issue proclamations under stated conditions which changed the law pursuant to the previously delegated Congressional authority. It cannot be denied that a *validly issued* Proclamation under that Act constitutes the law from and after date of its issuance. Whether it be an Act of Congress setting a rate, or a Proclamation of the President validly issued, it is legislative in character in that it establishes a new rate. Not so with the mistakes or whimsical acts of other administrative officials for in performing such acts they are engaged in administration pure and simple. Not so with mistakes by the Courts in the application of laws, for that is judicial, not legislative in nature.

And there lies the dividing line which we believe made it difficult for the majority below and the Court of Customs to distinguish between *Mason* and the case here:

> "We have the same difficulty as did the Customs Court in finding a valid distinction between an unconstitutional statute on the one hand, and an invalid Presidential Proclamation on the other—the effect is the same in both cases."

Even the minority of the Court below did not contend that the decision in *Mason* was erroneous. Instead, it stated:

> "We have gone so far as to make a judicial (not Congressional) exception in the case of unconstitutional statutes. Now that it has been shown to us * * * where so-called 'logical' extensions of that exception clearly lead, it behooves us to stop where we are and make no further exceptions, for we are on a collision course with express Congressional intent."

The difficulty with the minority was that it failed to perceive that both *Mason* and *Cajo* involved instances in which "the law" pursuant to which the liquidation was made was void. And not only *Mason* is right but so is *Cajo*, for a Presidential Proclamation becomes "the law" unless, as here, *it is void*—and all actions taken by the Executive Department pursuant to a liquidation pursuant to a *void* "law" must *perforce* be *void.*

Petitioner fails to cite any decision of the Court below with which the decision in *Cajo* is in conflict. In fact, the decision below was held by that Court to be indistinguishable from *Mason*—which this Court refused to review. Similarly it fails to cite any decision of this Court which is in conflict with the decision below. Instead, the decisions of this Court are in accord with the conclusions of the Court below and with those in *Mason.*

The doctrine of void liquidations derives from a long line of Supreme Court decisions culminating in *United States* v. *Passavant*, 169 U.S. 16 (1898).

In *Passavant* the appraiser had included in his appraisement the amount of a tax remitted to the exporter

by the exporting country. The importer did not appeal to the Board of General Appraisers for reappraisement, but instead protested after liquidation. Section 13 of the Customs Administrative Act of 1890 [1] made the decision of the appraiser "final and conclusive as to the dutiable value of such merchandise against all parties interested therein" if an appeal to reappraisement were not taken within two days after appraisement. This limitation, the government contended, deprived the Board and the appellate courts of jurisdiction to determine the appraisement issue.

The Court, however, overruled the govenment's contention—

> ". . . while the general rule is that the valuation is conclusive upon all parties, nevertheless, the appraisement is subject to be impeached where the appraiser or collector has proceeded on a wrong principle contrary to law or has transcended the powers conferred by statute." (169 U.S. 21) [2]

and proceeded to hold, on the merits, that the remitted tax was not properly a part of dutiable value.

The *Passavant* rule has been expressly followed by this Court and the Court of Customs & Patent Appeals.[3] After the establishment of the Customs Court in 1926,[4] the rule of *Passavant* was judicially modified to the extent that when, upon protest, a liquidation was voided for any reason requiring further appraisement pro-

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[1] 26 Stat. 131, 137.

[2] See also the prior cases reaching the same result. *Oberteuffer* v. *Robinson*, 116 U.S. 499; *Badger* v. *Cusimano*, 130 U.S. 39; *Robertson* v. *Frank Bros. Co.*, 132 U.S. 17; *Erhardt* v. *Schroeder*, 155 U.S. 124; and *Muser* v. *Magone*, 155 U.S. 240.

[3] See *Stein* v. *United States*, 1 Ct. Cust. App. 36, T.D. 31007 (1910) and *Stahel & Co.* v. *United States*, 11 Ct. Cust. App. 430, T.D. 39435 (1923).

[4] c. 411, Secs. 1 and 2, 44 Stat. 669.

ceedings, the cause was remanded to the collector for a new appraisement rather than the court itself determining the appraisement question.[5] Finally, the problem of what to do with appraisement questions resulting from the voiding of a liquidation upon protest was resolved by the Customs Administrative Act of 1938[6] which requires that such questions be remanded for determination by a single judge of the Customs Court sitting in reappraisement.

Thus, *Passavant* established the doctrine that an appraisement will be "impeached," and the liquidation based on it voided, if made on "a wrong principle contrary to law" or if the appraiser or collector "has transcended the powers conferred by statute," this notwithstanding the statute of limitations which bars the review of appraisement questions if no timely appeal to reappraisement is taken. See *United States* v. *James H. Rhodes & Co.*, 40 C.C.P.A., (Customs) 1 C.A.D. 488 (1952); *James S. Kean* v. *United States*, 20 C.C.P.A. (Customs) 388, T.D. 46186 (1933); *United States* v. *William Heyer*, 31 C.C.P.A. (Customs) 111, C.A.D. 259 (1943); *Stubbs* v. *United States*, 7 Ct. Cust. App. 399 T.D. 36967 (1917).

Thus there is no conflict in the law as developed judicially. The decisions consistently hold that a liquidation tainted with a constitutional infirmity is void. The incorporation of a rate of duty which derives from a Presidential Proclamation judicially declared void as an overstepping by the President of rate setting powers delegated to him by the Congress is no less serious an infirmity than a rate derived from a statute judicially declared to have been unconstitutional.

The decisions of the Court of Customs and of the C.C.P.A. in the field of Customs Law are of particular

[5] See *United States* v. *Tampa Box Co.*, 15 Ct. Cust. App. 360, T.D. 42561 (1928) and especially *United States* v. *Alex Murphy & Co.*, 16 Ct. Cust. App. 461, T.D. 43210 (1929).

[6] Sec. 16(b), 52 Stat. 1084, 28 U.S.C. 2636(d).

application only to the valuation, classification and procedural problems involved in the Customs field. They have not generally been cited as authority or followed in either the trademark or patent fields, nor in decisions of courts of general jurisdiction. The spectre raised by Petitioner that the decision below may lead to a change in federal law relating to statutes of limitation generally, finds no support in the decisions of this or other courts and is without substance.

Finally, the Government argues that this Court should review the decision below because the effectiveness of the Statute of Limitations in Section 514 is at stake here and, perforce, it contends an important federal question is involved. It points out that Section 514 involves *all* decisions of the collector, including the legality of all orders and findings entering into same, as to the rate and amount of duties chargeable.

This is another straw man and without substance. The principle involved here is of limited application. There have been but few cases where a Collector of Customs has acted pursuant to a void statute or Presidential Proclamation and, the government's unwarranted assumption to the contrary, there are not likely to be many in the future. Such cases could only multiply if there was a substantial deterioration in the ability of lawyers advising administrators and lawmakers on the validity of proposed statutes and proclamations.

At page 12 of its petition for writ of certiorari in *Mason*, the government submitted the same reasons it now urges in *Cajo* for granting certiorari. Whatever else the Supreme Court's denial of the government's petition for certiorari in *Mason* may signify, it indicates that this Court was not sufficiently disturbed by the government's recital there of other possible applications to wish to review the holding of the Court below in that case.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari be denied.

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